Office-Supreme Court, U.S.
FILED
OCT 7 1963
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1963

No. 381

VICTOR A. MEYERS, Secretary of State of the State of Washington, *Appellant*,

v.

JAMES THIGPEN and LEAGUE OF WOMEN VOTERS OF WASHINGTON, INC., *Appellees*.

APPEAL FROM THE SPECIAL THREE-JUDGE COURT CONVENED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

RESPONSE TO MOTION TO AFFIRM

JOHN J. O'CONNELL,
Attorney General of the State of Washington,

PHILIP H. AUSTIN,
Assistant Attorney General of the State of Washington,

LYLE L. IVERSEN,
Special Assistant Attorney General of the State of Washington,

Attorneys for Appellant.

Office and Post Office Address: 400 Hoge Building, Seattle 4, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1963

No. 381

VICTOR A. MEYERS, Secretary of State of the State of Washington, *Appellant*,

v.

JAMES THIGPEN and LEAGUE OF WOMEN VOTERS OF WASHINGTON, INC., *Appellees*.

APPEAL FROM THE SPECIAL THREE-JUDGE COURT CONVENED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

RESPONSE TO MOTION TO AFFIRM

JOHN J. O'CONNELL,
Attorney General of the State of Washington.

PHILIP H. AUSTIN,
Assistant Attorney General of the State of Washington.

LYLE L. IVERSEN,
Special Assistant Attorney General of the State of Washington.

Attorneys for Appellant.

Office and Post Office Address: 400 Hoge Building, Seattle 4, Wash.

INDEX

Page

I STATEMENT OF THE CASE 5

II RESPONSIVE ARGUMENT 6

A. Is Numerical Disparity the Sole Subject of Inquiry? 6

B. The Effect of Initiative and Referendum on the Issue of Invidious Discrimination Should be Carefully Examined 9

C. Population Shifts Should not Make an Apportionment Statute Unconstitutional Instanter 12

D. Is Governmental Chaos a Proper Equitable Remedy? 14

E. There Must be Limits on the Court's Supervision over Apportionment in the State Legislature 16

TABLE OF CASES

Baker v. Car, 369 U. S. 186, 7 L. Ed. (2d) 663 ..... 7, 8

Colegrove v. Green, 328 U. S. 549, 90 L. Ed. 1432 15

Ferguson v. Skupra, 372 U. S. 726, 10 L. Ed. (2d) 9[illegible] 6-7

Lisco v. Love, D. C. District of Colorado (July 16, 1963), 32 Law Week 2076 11

Marquez v. Aviles, 252 F. (2d) 715, Cert. Denied 356 U. S. 952, 2 L. Ed. (2d) 845 7

McDougall v. Green, 335 U. S. 281, 93 L. Ed. 3 8

Morey v. Doud, 354 U. S. 457, 1 L. Ed. (2d) 485 8

Nolan v. Rhodes, D. C. Southern District of Ohio (June 12, 1963), 31 Law Week 2641 10-11

St. Louis Union Trust Co. v. State, 348 Mo. 725, 155 S. W. (2d) 107, Cert. Denied 314 U. S. 700, 86 L. Ed. 560 7-8

WASHINGTON INITIATIVE MEASURES

Initiative Measure No. 57; Ch. 2, Laws of Wash. 1931 10

Initiative Measure No. 199; Ch. 5, Laws of Wash. 1957 .. 10

Initiative Measure No. 211 10

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1963

No. 381

VICTOR A. MEYERS, Secretary of State of the State of Washington, *Appellant*,

v.

JAMES THIGPEN and LEAGUE OF WOMEN VOTERS OF WASHINGTON, INC., *Appellees*.

APPEAL FROM THE SPECIAL THREE-JUDGE COURT CONVENED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

RESPONSE TO MOTION TO AFFIRM

STATEMENT OF THE CASE

The facts pertinent to this appeal are set forth in the Jurisdictional Statement heretofore filed by appellant.

II

RESPONSIVE ARGUMENT

A. Is Numerical Disparity the Sole Subject of Inquiry?

Appellees, in their Motion to Affirm, base their argument solely, as they did in the case below, upon numerical disparity in the population of some districts from which legislators are selected. They particularly emphasize disparity in senatorial districts as distinguished from representative districts, and apparently assume that proof of numbers is the sole inquiry in determining whether equal protection of the law has been denied. The lower court apparently took the same attitude and permitted no proof in explanation or justification of the existing apportionment.

The first proposition raised by this appeal, namely: *Does numerical disparity in population of some districts from which members of the state legislature are elected without any other showing of discrimination, violate the equal protection clause of the 14th Amendment of the Federal Constitution so as to invalidate all state apportionment laws?* presents an important and as yet undecided question of great public interest. This court has repeatedly held that only "invidious discrimination" violates the equal protection clause of the 14th Amendment of the Federal Constitution. This court most recently reiterated that long-standing principle in *Ferguson*

v. Skupra, 372 U. S. 726, 10 L. Ed. (2d) 93. Up to this time, this court has never held that numbers alone without any other factor and without any opportunity to explain or justify numerical disparity would establish invidious discrimination in apportionment of legislative representation. In the milestone case of *Baker v. Carr*, 369 U. S. 186, 7 L. Ed. (2d) 663, Mr. Justice Douglas in his concurring opinion said:

> "The traditional test for the equal protection clause has been whether a state has made 'an invidious discrimination' as it does when it selects a 'particular race or nationality for oppressive treatment'. See *Skinner v. Oklahoma*, 316 U. S. 535, 541. Universal equality is not the test; there is room for weighting. As we stated in *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489, 'the prohibition of the equal protection clause goes no further than the invidious discrimination.'"

We have here a case where the lower court expressly finds in the opening language of its opinion (see Appendix B of the Jurisdictional Statement) that this is a problem created by population growth, yet with no showing of any intention to discriminate against any race, minority or group. The lower court found the equal protection clause of the 14th Amendment violated by a mere showing of numbers. The equal protection clause has repeatedly been held to be violated only by *purposeful discrimination* with no rational basis, *Marquez v. Aviles*, 252 F. (2d) 715, Cert. Denied 356 U. S. 952, 2 L. Ed. (2d) 845; *St. Louis Union Trust Co. v. State*, 348 Mo. 725, 155

S. W. (2d) 107, Cert. Denied 314 U. S. 700, 86 L. Ed. 560; *Morey v. Doud*, 354 U. S. 457, 1 L. Ed. (2d) 485.

Appellees, in their argument, cite from the pre-trial order the greatest extremes of disparity in population, but nowhere is there any evidence admitted or before the court to show whether rapid changes in population brought these situations about, whether considerations of geography, economics, mass media, and functional or group voting strength justify any of the differences, and the court declined to hear even an offer of proof to supplement the purely statistical data regarding numbers contained in the pre-trial order. Thus, it is recited in the decree appealed from (see Appendix A of the Jurisdictional Statement):

> "The Special Assistant Attorney General, having made an offer of proof for the record and said oral offer of proof having been refused by the court * * *."

This court did not, in *Baker v. Carr*, 369 U. S. 186, 7 L. Ed. (2d) 663, say that proof of numbers alone made out a case of invidious discrimination to invoke the authority of the federal courts to invalidate state laws, but this court, on the other hand, did hold in *McDougall v. Green*, 335 U. S. 281, 93 L. Ed. 3, that political power is not exclusively a matter of numbers. That case was not overruled by this court in any subsequent decision, but, on the contrary, Mr. Justice Stewart in his concurring opinion in *Baker v. Carr, supra*, said:

> "In *McDougall v. Green*, 335 U. S. 281, the court held that the equal protection clause does

not 'deny a state power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former,' 335 U. S. at 284. In case after case arising out of the equal protection clause the court has said what it said again only last term —that 'the 14th Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others,' *McGowan v. Maryland*, 366 U. S. 420, 425. In case after case arising under that clause we have also said that 'the burden of establishing the unconstitutionality of a statute rest on him who assails it,' *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 584. Today's decision does not turn its back on these settled precedents."

This court should give plenary consideration to the first question raised by our appeal, namely, *Whether numbers alone without any other consideration or any other proof of invidiousness make such a case of denial of equal protection as to invoke, without more, the extraordinary powers of the federal courts to void state reapportionment statutes?*

B. The Effect of Initiative and Referendum on the Issue of Invidious Discrimination Should be Carefully Examined.

In Washington, initiative and referendum not only are available to the people, but for purposes of reapportioning the legislature, have been repeatedly resorted to. The procedure of initiative in which every person's vote throughout the state is equal

to that of every other person, is not, in Washington, an illusory remedy but is a very real one. The apportionment of the legislature in 1930 was accomplished by Initiative Measure No. 57, Chapter 2, Laws of 1931 of the State of Washington. In 1956, Initiative Measure No. 199, Chapter 5, Laws of 1957 of the State of Washington, again apportioned the state. In 1962, Initiative Measure No. 211 got on the ballot and the voters had an opportunity again to vote on the reapportionment. Apparently the voters did not like the form of reapportionment last attempted, but these facts, which are recognized in the lower court's opinion, show that it is no idle contention that the people have the right directly to apportion the state for legislative purposes. This is the way legislative apportionment has been done in the State of Washington and can be done again.

Counsel for appellees undertake to argue that due to stringent requirements for placing an initiative measure on the ballot, the power of initiative is no remedy at all. This simply ignores the facts, which are that the initiative in Washington is a viable and active means of legislating. At least one federal three-judge court has held recently that the right of the people to extricate themselves from any situation of inadequate representation is a sufficient answer to a claim that the equal protection clause is violated where legislative apportionment is not on a basis of mathematical equality. In the case of *Nolan v. Rhodes*, decided by the three-judge court for the

Southern District of Ohio, on June 12, 1963, reported in 31 Law Week at p. 2641 the court sustained the Ohio apportionment plan whereby the Senate was apportioned by population and the House by area and population, and in arriving at this result gave substantial weight to the right of direct legislative action by the people, saying:

> "(Urban voters) complain about the practical difficulties of inducing Ohio's legislature to submit proposals to amend the constitution for a vote of the people or in securing signatures on initiative petitions. The fact is that in almost every state election there are proposals on the ballot to amend Ohio's constitution. The contention also overlooks the right of the people to vote for a constitutional convention every 20 years. We submit it ought not to be easy to amend or change the basic law of a state or nation. If the rule were otherwise, Ohio would be flooded with crackpot schemes, some of which today are being urged in respect to amending the Constitution of the United States."

That court gave considerable effect to the fact that the people of Ohio have the right of direct legislation. See also, *Lisco v. Love*, decided by a three-judge Federal District Court in Colorado on July 16, 1963 and reported in 32 Law Week at p. 2076. There the court rejected a contention that a state constitutional apportionment plan *adopted by popular vote* was invidiously discriminary, stating:

> "The contention that the voters have discriminated against themselves appalls rather than convinces."

In Washington, the right of direct legislation has probably been used more than anywhere else, and

there can be little doubt that at the next general election, as at the last, and virtually all of the others before that, there will be various measures on the ballot for the people to enact by direct legislation.

Counsel for appellees would have this court summarily dismiss the consideration of the effect of initiative and referendum, whereas this factor makes Washington far different from most of the other states where the question of legislative apportionment in the light of the 14th Amendment has been considered.

This court should consider this factor at length, and there is no other case for which jurisdiction has now been noted, to our knowledge, which gives consideration to the matter of initiative and referendum as a means of legislating and apportioning the state. The control of the means or manner of apportionment is an attribute of popular government not to be lightly usurped by the federal courts so long as the people of the state do have a real and effective means of protecting themselves by direct legislation.

C. Population Shifts Should Not Make an Apportionment Statute Unconstitutional Instanter.

Appellees, in their discussion of a third question presented, apparently argue that the decision of the lower court insofar as this question is concerned should be affirmed because of a provision in the Washington Constitution. It is not the function of the federal courts to enforce the Washington Con-

stitution, and the question presented really is whether a disparity in legislative representation makes an apportionment law unconstitutional *instanter* when a shift in population or some other factor brings it about. Appellees would have the court hold that a federal constitutional violation giving rise to invalidation of all state apportionment laws must arise as soon as the figures will show population discrepancies in legislative districts.

Under our form of state government, we submit that federal intervention under the due process clause is warranted only from *gross* neglect of the equal rights of the people. We submit that this court should examine carefully the question of *how soon* after a discrepancy in approximate equality of representation is detected a state must act. If a state legislature has difficulty in evolving a satisfactory formula attempted in good faith, are the federal courts going to immediately void everything that has gone before and throw the legislative election system into chaos?

This is a serious question and we believe it deserves serious consideration and clearly should not be disposed of without full briefs and argument. Nothing the court has said heretofore on the subject of apportionment has indicated that this is a matter for instant federal action. If five years of state legislative delay is enough to invoke the federal remedies, is the lapse of any time at all necessary whenever it is shown that legislative district populations are out of balance? We submit that this is too serious a question to be disposed of summarily.

D. Is Governmental Chaos a Proper Equitable Remedy?

In appellees' discussion of our fourth question, they asked for summary affirmance of the decision below because they say s lution of the entire problem is in calling the Washington legislature into special session. This overlooks the fact that the legislature has been called in special session and because of an unusual political deadlock was unable to agree. There is nothing in the record to indicate that another special session prior to an election which should break the deadlock will be any more productive than the last.

The government of a state is too important a thing to be thrown into chaos by the federal courts' invalidating all of the existing election statutes. This court has not laid down any guides as to the procedures of the federal courts in apportionment cases, but surely equity is not served by invoking remedies much worse than the disease. In other words, because plaintiff Thigpen feels that he is not being adequately represented, should we disenfranchise the whole population by imposing an utterly unworkable at-large election upon the population, whereby voters at a single election would be required to make 123 selections from a ballot containing from 1,000 to 3,000 names and the practicalities of the situation would make any intelligent voting impossible, or, in the alternative, the voters could be disenfranchised by having no elections at all?

In respect to congressional elections, this court has held that it would not leave a state undistricted,

see *Colegrove v. Green*, 328 U. S. 549, 90 L. Ed. 1432. The very reasons that impelled the court to hold it would not leave a state undistricted for congressional purposes, are true a hundredfold for the legislature, where the numbers are so great that the election becomes impractical.

There are alternative remedies. Thus, the 14th Amendment of the Federal Constitution provides in Section 5:

> "The Congress shall have power to enforce by appropriate legislation the provisions of this Article."

This provides an adequate avenue for remedying a situation of malapportionment which will not leave a governmental hiatus and will provide a political solution to the political question of how apportionment shall be accomplished if it is not taken care of by the state authorities. In the case of *Colegrove v. Green*, *supra*, this court indicated that because of a right of Congress to correct congressional malapportionment, the court would not undertake to accomplish it.

The consequences of the action in the lower court in this case are so grave in their effect upon the government of the State of Washington, that this matter of the remedy in the light of equitable principles should be thoroughly briefed and argued. The means of providing a political solution to the question of how legislative apportionment shall be accomplished is furnished through Section 5 of the 14th Amendment. We submit that Congress could

take action if that became necessary, but a state government is too important a thing for the courts to put its means of legislative election into suspension as a means of coercing the state and its people into reapportioning. That is not necessary. The 14th Amendment itself furnishes the remedy and unless the court is to invoke a remedy worse than the disease, something must be done other than the merely negative act of voiding all of the apportionment statutes on the books. In other words, something must be done to take the place of the statutes voided. We submit that the ramifications of the remedy must be thoroughly explored.

E. There Must Be Limits On the Court's Supervision Over Apportionment In the State Legislature.

Dealing with the sixth question raised in our Jurisdictional Statement, namely, *What if any limits exist as to the extent of federal court supervision over actions by a state to apportion representation in its legislature?* We concur with appellees that the court should proceed cautiously in this "uncharted sea." In this case, apparently the lower court intends to exercise an indefinite auditing position over whatever future legislation may be enacted on this subject. The court is getting out of the ordinary role of courts which should decide controversies between parties, and is going into a new field, that of supervising legislation. The court has retained jurisdiction notwithstanding that a final decree has been

made and it has voided all existing apportionment laws. The implication of the court's indefinite retention of jurisdiction is that the court from now on is going to stand as a vetoing agency over whatever the legislature does. It should be noted that it is not upon motion of any party that the court has retained jurisdiction, but the court evidently on its own motion intends from now on to audit whatever the legislative authority of the state does on this subject.

The concept of the federal court indefinitely retaining jurisdiction to supervise a state's legislation on a particular subject after it has disposed of the controversy before it by a final decree is something new in federal-state relationships. There should be some limits to judicial authority and this court should not by summary affirmance sanction the maintenance of a veto by the courts over state legislation, the contents of which are not now known and which are not involved in any controversy now apparent. The sixth question is indeed one that should be briefed and argued and decided only after thorough consideration.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General of the State of Washington,

PHILIP H. AUSTIN,
Assistant Attorney General of the State of Washington,

LYLE L. IVERSEN,
Special Assistant Attorney General of the State of Washington,

Attorneys for Appellant.